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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

<p>SAMSON TUG AND BARGE CO., INC., an Alaska Corporation</p> <p>Plaintiff/Appellant</p> <p>v.</p> <p>UNITED STATES OF AMERICA,</p> <p>acting by and through</p> <p>the UNITED STATES DEPARTMENT of the NAVY MILITARY SEALIFT COMMAND, and UNITED STATES DEPARTMENT OF THE ARMY MILITARY TRAFFIC MANAGEMENT COMMAND</p> <p>Defendants/Appellees</p>	<p>) Civil No. A03-006 CV</p> <p>) IN ADMIRALTY</p> <p>)</p> <p>) NOTICE OF AND MOTIONS</p> <p>) IN LIMINE, WITH SUPPORTING</p> <p>) MEMORANDUM, BY DEFENDANT,</p> <p>) UNITED STATES OF AMERICA, TO</p> <p>) EXCLUDE AND/OR LIMIT</p> <p>) CERTAIN TRIAL TESTIMONY BY</p> <p>) PLAINTIFF</p>
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Pursuant to this Court's order, defendant United States of America, hereby moves to

1 exclude and/or limit certain anticipated testimony by witnesses expected to be called by
2 plaintiff Samson at the trial of this long pending case. Because the parties have not yet met
3 to discuss nor have they prepared their submissions in advance of trial, which will commence
4 on September 30, 2008, the United States must reserve its right to bring additional motions
5 *in limine* until such time as plaintiff reveals its trial presentation intentions more specifically.
6 Nevertheless, based on the record to date, the United States suggests that certain issues
7 regarding the testimony of witnesses expected to testify on behalf of plaintiff appear at this
8 time to require resolution in advance of trial.

9 This motion is based on the Memorandum which follows, the Exhibits attached
10 hereto, the Declaration of Jeanne M. Franken submitted in support hereof, and the entire file
11 of the Court. A proposed form of Order is also being submitted.

12 I. Witnesses who were not disclosed in a timely fashion by plaintiff Samson should
13 be excluded.

14 This case has been pending for over five years. At issue is a Government contract for
15 ocean transportation to and from Adak Island by plaintiff Samson's barge service in the years
16 1995-1997, a period more than ten years ago. Over the course of this lengthy litigation, the
17 parties respectfully sought and were granted numerous extensions in the applicable pretrial
18 schedule, including in the date for them to disclose the names of trial witnesses, to disclose
19 experts, and to file their expert reports.

20 Plaintiff Samson failed to submit a trial witness list until the last of the deadlines on
21 April 27, 2007, whereas the United States had filed at least seven such witness disclosures
22 during the years when discovery was open. On November 26, 2007, about seven months
23 after the last of the deadlines for submission of witness lists, counsel for plaintiff Samson
24 filed and served another list in which it purported to name some additional trial witnesses.
25 Government counsel then reminded plaintiff's counsel that this attempt to supplement its list
26 was extremely tardy; inquired about what the substance of the new witnesses' testimony
27 would be, without a response; and advised that her intent was to move to exclude those
28 witnessses who had not been timely disclosed by plaintiff. (See the Franken Declaration.)

1 Samson took no action.

2 To allow witnesses to testify for plaintiff who were not properly and timely disclosed
3 by it would run counter to the disclosure requirements of the Federal Rules of Civil
4 Procedure, the Local Rules of Court and this Court's orders, and would be prejudicial to the
5 Government. Witnesses not identified in a timely fashion should be excluded.

6 II. Testimony by witnesses on subjects for which plaintiff Samson failed to produce
7 a witness in response to a properly noticed and convened deposition pursuant to
8 Fed.R.Civ.Pro.30(b)(6) should be excluded.

9 On June 29, 2007, the United States served plaintiff Samson with a notice pursuant
10 to Fed.R.Civ.Pro. 30(b)(6), requesting that one or more witnesses be produced a month later
11 on July 27, 2007, to testify on its behalf on the factual bases for the following of Samson's
12 contentions: that a diversion of what it calls "contract cargo" actually occurred; that the
13 alleged diversion was to air carriage; that the Government had supposedly agreed to ship "all
14 military and military sponsored cargo" with Samson; that Samson was entitled to attorneys'
15 fees; the amount of Samson's fees and costs; and that the Government's denial of Samson's
16 claim was baseless. (See the Franken Declaration and Exhibit "A" submitted in support
17 hereof.) Plaintiff did not communicate a conflict with the date, and did not seek to postpone
18 or reschedule the 30(b)(6) deposition; neither did it seek a protective order to stop the
19 deposition, which Government counsel advised would otherwise proceed. Government
20 counsel did convene the deposition on the date and at the time and place noticed, but no
21 witness appeared to speak for plaintiff Samson on the subjects set forth in the notice. (See
22 the Franken Declaration and Exhibit "B".) The United States, therefore, seeks to prevent
23 testimony by plaintiff's witnesses at trial on the aforesaid subjects, as specified in the
24 properly served notice.

25 III. Plaintiff's proposed damage expert George Johnson should not be permitted to
26 testify beyond the scope of his alleged expertise, nor to render opinions contained in a report
27 he produced after expiration of the last of the many deadlines set for submission of expert
28 reports.

1 The final deadline for filing and exchanging expert reports expired on July 20, 2007.
2 (See the Order of July 12, 2007, setting the deadline for the filing of expert reports, Docket
3 No. 61.) The United States met that deadline and timely filed and produced its expert report.
4 (See Docket No. 62.) Plaintiff Samson did not file the first report of its designated expert,
5 George Johnson, but did serve it on the United States prior to the deadlines, and Samson
6 subsequently revised its report, but again did not file it. Significantly after the deadline for
7 submission of expert reports, in November of 2007, counsel for plaintiff Samson produced
8 a further “supplemental” expert report in which it raised completely new issues and opinions
9 concerning the carriage of air cargo. Samson has not filed any of its expert reports with the
10 Court, contrary to the Court’s orders.

11 Although the Government was permitted to depose Mr. Johnson a second time with
12 regard to his untimely third report, it had no opportunity to obtain appropriate expertise to
13 challenge the new opinions he stated therein, and consequently would be prejudiced were he
14 permitted to testify on these additional matters in contravention of the Court’s deadlines.

15 Moreover, the Government questions whether Mr. Johnson, a certified public
16 accountant, has the required bona fides to arrive at the conclusions he advances in this very
17 late provided, “supplemental” report. Specifically, the United States submits that his
18 proposed testimony regarding the asserted carriage of cargo by air to and from Adak, and the
19 interpretation of military documentation pertaining thereto, cannot pass muster under the
20 “gatekeeping” requirements placed on the Court by Rule 702 of the Federal Rules of
21 Evidence and attendant Supreme Court precedent, *Daubert v. Merrell Dow Pharmaceuticals,*
22 *Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *upon remand*, 43 F.3d 1311,
23 1316 (9th Cir. 1995) (*Daubert II*), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d
24 126 (1995). The United States suggests that those portions of his proposed trial testimony and
25 the entirety of his last report, should be excluded on this basis under *Daubert* principles, in
26 addition to being untimely and submitted in violation of the Court’s orders.

27 Clearly, plaintiff Samson has the burden of establishing, by a preponderance of proof,
28 both the **qualifications** of its expert witness and the **admissibility** of his proffered evidence.

1 *Daubert*, supra at 592, fn. 10, citing Fed.R.Evid. 104(a) and *Bourjaily v. United States*, 483
 2 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). The qualifications of purported experts
 3 are part and parcel of the *Daubert* inquiry:

4 [A]n expert's qualifications bear upon the scientific validity of his
 5 testimony...'An expert's opinion is helpful only to the extent the expert
 6 draws on some special skill, knowledge, or experience to formulate that
 7 opinion; the opinion must be an expert opinion (that is, an opinion
 8 informed by the witness' expertise) rather than simply an opinion
 9 broached by a purported expert.'...

10 *United States v. Vitek Supply Corp.*, 144 F.3d 476, 486 (7th Cir. 1998) (citations omitted),
 11 *cert. denied*, 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37 (1999).

12 And just because a witness might qualify as an expert on some subjects, does not
 13 mean he can testify in other fields in which he is totally devoid of appropriate qualifications.
 14 *See, e.g., United States v. Chang*, 207 F.3d 1169 (9th Cir. 2000); *Wilson v. Woods*, 163 F.3d
 15 935 (5th Cir. 1999); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996). Federal
 16 Rule of Evidence 702 states:

17 If scientific, technical, or other specialized knowledge will assist
 18 the trier of fact to understand the evidence or to determine a fact
 19 in issue, a witness qualified as an expert by knowledge, skill,
 20 experience, training, or education, may testify thereto in the
 21 form of an opinion or otherwise, if (1) the testimony is based
 22 upon sufficient facts or data, (2) the testimony is the product of
 23 reliable principles and methods, and (3) the witness has applied
 24 the principles and methods reliably to the facts of the case.

25 In *Daubert*, supra, the Supreme Court emphasized that under Rule 702, the subject of
 26 an expert's testimony must be **scientific** knowledge. *Id.* at 589-90(emphasis added). The
 27 Court explained that this requirement is embodied in the Rule's very words; "scientific"
 28 implies a grounding in the methods and procedures of science, and "knowledge" connotes
 more than a subjective belief or an unsupported speculation. *Id.* at 590. Therefore, in order
 to qualify as "scientific knowledge," an expert's inference or assertion must be derived by
 using the scientific method, and an expert's testimony is not admissible unless "the reasoning
 or methodology underlying the testimony is scientifically valid". *Id.* at 592-93. *Daubert* thus

1 clearly imposes an obligation on a trial judge to ensure that scientific testimony is reliable,
2 as well as relevant. *Id.* at 589. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct.
3 1167, 143 L.Ed.2d 238 (1999), the Supreme Court resolved post-*Daubert* conflicts in the
4 lower courts and held that the gatekeeper function applied to **all** expert testimony.

5 The question that needs to be answered here is whether plaintiff's accountant Mr.
6 Johnson analyzed the subject of the carriage of cargo by air to and from Adak Island with the
7 same intellectual rigor and precision one would expect from an actual expert in that field,
8 using an established, generally accepted and tested methodology. The clear answer is no.

9 A cursory review of Mr. Johnson's resume reveals he could not have done so since
10 he lacks the minimum qualifications, whether by education, experience, service or
11 employment, to perform such an assessment, a fact he apparently admits. (See the Franken
12 Declaration and Exhibits "C" and "D", wherein at marked page 48 he responds "No" when
13 asked if he is an expert on the carriage of cargo by air.) He did not follow any methodology
14 at all, let alone a verifiable and scientifically accepted one, for arriving at his conclusions
15 regarding the air cargo. (See the Franken Declaration and Exhibit "D".) Consequently, the
16 Government contends all testimony on the carriage of air cargo by Mr. Johnson must be
17 excluded, and plaintiff should be precluded from introducing his tardy and defective
18 "supplemental" report in its entirety. (The Government must reserve its right to raise
19 *Daubert* and other issues with regard to his remaining testimony on damages at the time it
20 briefs the case for trial.)

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CONCLUSION

For the foregoing reasons, the motions *in limine* of defendant United States of America should be granted, and plaintiff's trial presentation limited accordingly.

Respectfully submitted,

Dated: March 31, 2008

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s/Jeanne M. Franken

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2008, a copy of the foregoing UNITED STATES OF AMERICA'S NOTICE OF AND MOTIONS IN LIMINE, WITH MEMORANDUM, was served electronically on:

Richard D. Gluck, Esq.
Garvey Schubert Barer

William G. Royce, Esq.
Law Office of William G. Royce

Attorneys for Plaintiff/Appellant
Samson Tug and Barge Company, Inc.

s/Jeanne M. Franken

JEANNE M. FRANKEN